Public Prosecutor v Adetunji Adeleye Sule

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–139–92
ABDUL HAMID OMAR LP, EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
8 APRIL 1993

Criminal Procedure *— Trial — Possession of and trafficking in dangerous drugs — Trial judge took into consideration conduct and demeanour of accused at time of arrest and exculpatory cautioned statement of accused — Accused acquitted without calling on defence — Whether trial judge was wrong in acquitting the accused — Whether there was 'proof to the contrary' sufficient to rebut statutory presumptions — Dangerous Drugs Act 1952 ss 37(d), (da) & 39B*

Criminal Procedure *— Trial — Cautioned statement — Admissibility of wholly exculpatory cautioned statement*

The respondent was charged for trafficking in a dangerous drug in contravention of s 39B of the Dangerous Drugs Act 1952 ('the Act'). The facts showed that he had in his possession a trunk with a specially constructed double layer bottom in which the heroin was found. The learned trial judge acquitted and discharged the respondent at the end of the prosecution case, relying on: (a) the conduct and demeanour of the respondent at the time of his arrest and shortly thereafter and; more importantly, (b) the wholly exculpatory cautioned statement of the respondent made the day after his arrest. The trial judge found that it was more likely than not that the respondent did not know that the trunk which he claimed to have been given to him by a friend, contained the heroin. The public prosecutor has appealed against the decision.

Held, allowing the appeal:
Until the contrary was proved, the respondent, by reason of s 37(d) of the Act, was deemed to be in possession of the heroin and to have known the nature of such drug and, by reason of s 37(da) of the Act, was further presumed to be trafficking in the same. The trial judge was wrong to have acquitted the respondent at the close of the case for the prosecution because neither the conduct and demeanour of the respondent, accepting that to be consistent with innocence, nor his cautioned statement (which if true was a complete answer to the charge) should have constituted 'proof to the contrary' sufficient to rebut the statutory presumptions raised against him.

Per curiam:
If and when the respondent gives evidence to the same effect as his cautioned statement, he is entitled to take advantage of it and to point

A out that it is consistent with his evidence. Furthermore, a purely exculpatory statement made by the respondent out of court is evidence at the trial that the respondent made the statement and of his reaction but it is not evidence of the facts stated.

B **[Bahasa Malaysia summary**

Penentang telah dituduh mengedar dadah berbahaya melanggar s 39B Akta Dadah Berbahaya 1952 ('Akta itu'). Fakta-fakta di dalam kes ini menunjukkan bahawa beliau mempunyai di dalam milikannya suatu peti yang mempunyai dua lapisan bawah yang khusus dibawah di mana ganja itu dijumpai. Hakim perbicaraan yang arif telah C membebas dan melepaskan penentang pada penamatan kes pendakwa, berdasarkan: (a) kelakuan dan tingkah laku penentang pada masa beliau ditangkap dan sejurus selepas itu dan; yang lebih penting lagi, (b) pernyataan beramaran yang dibuat oleh penentang sehari selepas beliau ditangkap yang mungkin boleh membebaskannya dari tuduhan D itu. Hakim perbicaraan berpendapat yang besar kemungkinan bahawa penentang, yang mendakwa bahawa peti itu telah diberikan kepadanya oleh kawannya, tidak tahu bahawa peti itu mengandungi ganja itu.

Diputuskan, membenarkan rayuan itu:
Sehingga sebaliknya terbukti, penentang, disebabkan s 37(d) Akta E Dadah Berbahaya 1952 ('Akta itu'), disifatkan sebagai pemilik ganja itu dan, disebabkan s 37(da) Akta itu, disifatkan sebagai pengedar ganja itu. Hakim perbicaraan telah silap apabila membebaskan penentang di akhir kes pihak pendakwa kerana baik kelakuan dan tingkah laku penentang, yang diterima sebagai menunjukkan bahawa beliau tidak bersalah, mahupun pernyataan beramarannya (yang mana F jika benar boleh menjadi jawapan sepenuhnya kepada tuduhan itu) tidak seharusnya menjadi 'proof to the contrary' yang mencukupi untuk mematahkan anggapan statutori yang ditimbulkan terhadapnya.

Per curiam:
Jika dan apabila penentang memberi keterangan berdasarkan G pernyataan beramarannya, beliau berhak mengambil kesempatan darinya dan menunjukkan bahawa ianya konsisten dengan keterangannya. Tambahan pula, suatu pernyataan yang mungkin membebaskannya dari tuduhan itu yang dibuat oleh penentang diluar mahkamah, merupakan keterangan pada perbicaraan itu bahawa penentang telah membuat pernyataan itu dan untuk menunjuk H reaksinya tetapi tidak merupakan keterangan mengenai fakta-fakta yang disebut.]

Notes
For cases on cautioned statements used in a trial, see 5 *Mallal's Digest* I (4th Ed) paras 2553–2570.

Cases referred to
1 *PP v Yuvaraj* [1969] 2 MLJ 89 (folld)

2 *Day v Dyson* (1965) VR 165 (not folld)
3 *PP v Lin Lian Chen* [1992] 2 MLJ 561 (distd)
4 *R v Donaldson* (1977) 64 Cr App R 59 (refd)
5 *R v McCarthy (GJ)* (1980) 71 Cr App R 142 (refd)

Appeal from: Criminal Trial No 47–09–91 (High Court, Alor Setar)

Ng Aik Guan (Deputy Public Prosecutor) for the public prosecutor.
MM Athimular (*Kumar Sitham & Co*) for the respondent.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): The respondent, a Nigerian national, was prosecuted in the High Court, Alor Setar, on a single count of trafficking in a dangerous drug to wit, heroin, weighing 2233.9g on 20 October 1990, in contravention of s 39B of the Dangerous Drugs Act 1952 ('the Act').

At the close of the case for the prosecution, the trial judge (Mohd Noor bin Hj Abdullah JC) acquitted and discharged him without calling upon the defence on the ground that the prosecution had not established a prima facie case. The public prosecutor being dissatisfied with that decision had appealed to this court.

According to the evidence led by the prosecution, on 20 October 1990 at 3.30pm, the respondent had entered Malaysia at an immigration entry point at Bukit Kayu Hitam, Kubang Pasu, Kedah, by bus from Thailand on transit to Singapore. He carried with him an aluminium trunk and a briefcase. On arrival at the customs counter, he declared certain ceramic items contained in the trunk which he opened with a key. On examination by the customs officer Roslan bin Othman (PW2), the briefcase was found to contain ceramic items and personal items and the trunk to contain clothes and ceramic items. As the respondent had intended to take the ceramic items to Lagos, Nigeria, he was required to, and did, pay a sum of RM250 described as a 'deposit/security'. Customs officer Baharom bin Haji Ahmad (PW3) then sealed the trunk and the respondent then walked back to his bus carrying with him the briefcase and the trunk.

At this point, another customs officer of the drug preventive unit, caught sight of the respondent as he walked towards the bus and, at the former's behest, yet another customs officer Chow Kum Weng (PW6) stopped the respondent requesting him to proceed to the office of the preventive branch, customs and excise department. This the respondent did, and on arrival there, a specially trained dog sniffed the trunk with positive results. An inspection of the inside of the trunk revealed nothing incriminating but when customs officer Chow Kum Weng punctured a hole at the bottom layer of the trunk, a white powdery substance oozed out. A more detailed examination of the trunk then followed and this resulted in the recovery of a quantity of white powdery substance — suspected to be heroin — concealed in a double layer secret compartment located at the bottom of the trunk. The respondent was then promptly placed under arrest and the trunk with its contents seized.

A The powdery substance was then duly sent to the government chemist, Mr Chong Sip Seng (PW1), who examined and analyzed it according to the usual procedures, and as a result, confirmed the suspicions of the custom officers, that it did indeed contain heroin, a dangerous drug within the meaning of s 2 of the Act, having a net weight of 2233.9g.

B The chemist also examined the trunk and found that it had a specially constructed double layer bottom which had been opened up at three of its edges. He also found traces of the white powdery substance containing heroin in the double layer bottom of the trunk.

In ruling that the prosecution had failed to tender evidence which, if unrebutted would warrant a conviction, the trial judge relied upon two C grounds, that is to say: (a) the conduct and demeanour of the respondent at the time of his arrest and shortly thereafter and; more importantly, (b) the wholly exculpatory cautioned statement of the respondent made the day after his arrest.

As to the conduct and demeanour of the respondent the trial judge referred to the testimony of the head of the preventive branch, customs and D excise, Encik Mohd Daud bin Md Ali (PW9), who witnessed the discovery of the heroin. According to this witness, the respondent 'shook his head in disbelief as to how the thing came to be there', was 'calm', and 'did not try to be evasive', and was 'co-operative'.

As to the cautioned statement of the respondent the trial judge noted E that in it the respondent had given a detailed account as to how he came to be in possession of the trunk, by whom and in what circumstances it was given to him by a friend with instructions to deliver it to the friend's brother. The respondent went on to give particulars of his itinerary, the purpose of his travels, his financial resources, his occupation and his family. The gist of the explanation offered in the cautioned statement being that F the respondent did not know that the trunk contained the heroin and so he was merely an innocent carrier.

In the event, the trial judge found that it was more likely than not that the respondent did not know that the trunk contained the heroin, and accordingly ruled that the prosecution had failed to establish a case to answer. Accordingly, he acquitted and discharged the respondent.

G One thing was clear at the close of the case for the prosecution and that was that the respondent was in manual possession of the trunk and that the heroin, the subject matter of the charge, was recovered from a secret compartment therein.

Upon that evidence, it was to be deemed, until the contrary was proved, that the respondent was in possession of the heroin and to have known the H nature of such drug, by reason of s 37(d) of the Act, and further, was to be presumed until the contrary was proved, to be trafficking in the same, by reason of s 37(da) of the Act.

With respect to the trial judge, we considered that he was wrong to have acquitted the respondent at the close of the case for the prosecution I because, neither the conduct and demeanour of the respondent accepting that to be consistent with innocence, nor his cautioned statement, (which, if true was a complete answer to the charge), should have constituted 'proof to the contrary' sufficient to rebut the statutory presumptions raised against him, having regard to the principles enunciated in *PP v Yuvaraj.*[1]

To elaborate, the conduct and demeanour of an accused may well be relevant and may therefore be taken into consideration when considering what weight should be accorded to the defence version but it *should* not by themselves be sufficient to rebut a statutory presumption which has been raised against an accused person.

In the same way, in a case where the onus lies on an accused to rebut a statutory presumption, a voluntary out of court statement by the accused — and this would include a cautioned statement — which ia wholly exculpatory *should* not be made the foundation of an order of acquittal especially at the close of the case for the prosecution, since, at that stage, the accused not having given evidence himself, his explanations could not be tested by cross-examination.

In *Day v Dyson,*[2] the defendant — on whom lay the burden of proof on the issue of a defence based on s 92 of the Australian Constitution that the vehicle in question was being used in the course of interstate trade — sought to rely on claims as to an interstate operation contained in an interview with the defendant which was led in evidence by the prosecution. It was held that, in a case where the onus lies on the defendant, evidence of innocence must be found elsewhere than in unsworn statements made out of court by the defendant or his agents.

With respect, in our view, it is not correct to say that an unsworn self-serving out of court statement by an accused by itself is incapable, as a matter of law, of discharging an onus which lies upon him. The proper comment should be that such a statement *should* not be sufficient by itself to discharge the onus lying on the accused.

This immediately brings to mind our decision in *PP v Lin Lian Chen,*[3] an appeal against an order of acquittal and discharge recorded at the close of the case for the prosecution, in a drug trafficking case where it was alleged by the prosecution that the accused was found in possession of heroin recovered from a car which he was driving at the time he was stopped and arrested. In upholding a submission of no case to answer, the trial judge had relied, not just on the wholly exculpatory statement of the accused (which he had admitted over the objection of the learned deputy public prosecutor) but on *other cogent evidence* appearing in the case for the prosecution, which went to show that the explanation in the cautioned statement as to the circumstances whereby he came to be driving the car, which was not his, at the behest of a friend and the circumstances under which a plastic bag containing the offending drug had been placed in the car by an old man, the contents of which he knew nothing of, could reasonably and probably be true.

On appeal, it was held, dismissing the appeal and upholding the order of acquittal and discharge, that: (1) the trial judge was correct in admitting the cautioned statement of the accused; (2) having regard to the circumstantial evidence, it could not be reasonably inferred that the accused must have been in custody or control of the drugs; and (3) in the circumstances, there was insufficient evidence, to attract the presumption of possession or control under s 37(d) and consequently of trafficking under s 37(da).

In the circumstances, *Lin Lian Chen*'s case[3] is readily distinguishable from the present case and we would take the opportunity to say that we see no reason whatever to depart from anything we had said there.

Having said that, we would add that if, and when, the respondent gives evidence to the same effect as his cautioned statement, he is entitled to take advantage of it and to point out that it is consistent with his evidence. Furthermore, as was rightly pointed out in *R v Donaldson,*[4] a purely exculpatory statement made by a defendant out of court 'is evidence at the trial in that it is evidence that the defendant made the statement and of his reaction which is part of the general picture which the jury have to consider but it is not evidence of the facts stated'. It follows, as the court did in fact hold in *Donaldson,*[4] that it is a misdirection to say that anything which a defendant may have said in his out of court statement is not evidence in the case save in so far as it may consist of an admission.

To the same effect is *R v McCarthy (GJ),*[5] in which the trial judge had refused to admit oral and written self-exculpatory statements made out of court by the accused to the police on the ground that they were self-serving. The accused had told the police at the time of making the statements that they were at liberty to check his movements if they so wished. It was held, on appeal, that that was a misdirection. Lawton LJ in delivering the judgment of the Court of Appeal said this at p 145:

> He (counsel for the respondent) pointed out that although the details were not evidence of the facts, the reaction of McCarthy when questioned by the police officer at the beginning of the interview was something which the jury could properly take into account as having some relevance to the genuineness of the defence of alibi. In our judgment (counsel) was right.
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> One of the best pieces of evidence that an innocent man can produce is his reaction to an accusation to crime. If he has been told, as the respondent was told, that he was suspected of having committed a particular crime at a particular place and he says at once, 'That cannot be right, because I was elsewhere' and gives details of where he was, that is something which the jury can take into account.

Lest we be accused of an oversight, we have not overlooked the principle that where a statutory presumption is raised against an accused person, so that the legal burden of proof is imposed on him, he may rebut this presumption either by adducing evidence during the case for the defence or by pointing to evidence in the case for the prosecution. What we have said in this judgment does not in any way, conflict with this principle and, indeed, is entirely consistent with it.

In all the circumstances, we had arrived at the conclusion that the order of acquittal and discharge be set aside with a direction to the trial judge that the respondent be called to enter upon his defence. We need hardly add, since it goes without saying, that at the conclusion of the case for the defence, the trial judge will have to make up his own mind as whether the respondent has succeeded in rebutting the statutory presumptions which have arisen against him.

Appeal allowed.

Reported by Prof Ahmad Ibrahim